

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 24, 2017

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

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A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2016AP1018-CR

Cir. Ct. No. 2013CF186

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

KEVIN G. ECKER,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Calumet County: ANGELA W. SUTKIEWICZ, Judge. *Affirmed.*

Before Neubauer, C.J., Gundrum and Hagedorn, JJ.

¶1 PER CURIAM. Kevin Ecker appeals from a judgment convicting him of theft in a business setting on his no contest plea and from a circuit court order denying his postconviction motion challenging the circuit court's denial of his eve-of-trial motion for new counsel and his presentencing motion to withdraw

his plea. We affirm because the circuit court properly exercised its discretion in both respects.

¶2 It is undisputed that Ecker, a realtor, obtained \$110,000 from the victims whom he had agreed to represent in the sale of their business and associated real estate. Ecker's defense was that the victims loaned these funds to him; the victim thought that the funds were intended to assist a buyer in the transaction. Ecker never presented a buyer. The victims were unable to recover their funds before Ecker commenced a bankruptcy case. The criminal complaint charged Ecker with theft in a business setting, alleging that he used the victims' money without their consent and with intent to convert the funds to his own use.

Motion for New Counsel

¶3 In a pro se communication received by the circuit court the day before trial, Ecker asked the circuit court for new counsel. As grounds, he alleged that his trial counsel had not spent enough time with him and had not prepared a defense. Deeming Ecker's request untimely, the circuit court denied the request to substitute counsel. Ecker appeared for trial and entered a no contest plea.

¶4 Whether to permit substitution of counsel was within the circuit court's discretion. *State v. Jones*, 2010 WI 72, ¶23, 326 Wis. 2d 380, 797 N.W.2d 378. Ecker had the burden to show good cause to substitute counsel. *State v. Lomax*, 146 Wis. 2d 356, 360, 432 N.W.2d 89 (1988). The reviewing court considers the following in evaluating whether the circuit court properly exercised its discretion in addressing a request for new counsel: (1) the adequacy of the circuit court's inquiry into the defendant's request, (2) the timeliness of the defendant's request, and (3) "whether the alleged conflict between the defendant and the attorney was so great that it likely resulted in a total lack of

communication that prevented an adequate defense and frustrated a fair presentation of the case.” *Id.* at 359. These factors are considered separately, not balanced against each other. *Jones*, 326 Wis. 2d 380, ¶30.

¶5 In addition, if, as here, substituting counsel would require a continuance, the circuit court must balance the defendant’s right to new counsel against society’s “interest in the prompt and efficient administration of justice.” *State v. Darby*, 2009 WI App 50, ¶30, 317 Wis. 2d 478, 766 N.W.2d 770 (citation omitted). In making this assessment, the circuit court should consider the following factors: (1) the length of the requested delay, (2) whether competent counsel is prepared to try the case, (3) whether a defendant has requested and received other continuances, (4) “[t]he convenience or inconvenience to the parties, witnesses and the court,” (5) whether there are legitimate reasons for the delay, and (6) “[o]ther relevant factors.” *Lomax*, 146 Wis. 2d at 360 (citation omitted).

¶6 The record supporting the circuit court’s denial of Ecker’s request for new counsel was made postconviction. *Id.* at 365. The court deemed trial counsel’s testimony at the postconviction motion hearing “very credible,” and Ecker’s testimony self-serving. These credibility findings were for the circuit court to make. *State v. Peppertree Resort Villas, Inc.*, 2002 WI App 207, ¶19, 257 Wis. 2d 421, 651 N.W.2d 345 (citation omitted) (the circuit court is “the ultimate arbiter of the credibility of the witnesses and the weight to be given to each witness’s testimony”).

¶7 Trial counsel testified that he had been preparing for and would have been ready for trial. Counsel had difficulty reaching and communicating with Ecker, Ecker never requested new counsel until he wrote to the circuit court

directly before the trial date, and counsel and Ecker had discussed Ecker's defense, which counsel did not believe would be successful given the available evidence. Counsel believed that Ecker was fit for trial.

¶8 The circuit court reviewed the entire case history which included Ecker's failure to appear at a motion hearing because he allegedly had medical issues that were never documented for the court. The court noted the delays in the case and Ecker's failure to cooperate in pre- and post-trial matters. The court found that Ecker engaged in a pattern of noncooperation, obstruction, and manipulation throughout the case in his dealings with his trial counsel and the presentence investigation report author. Ecker did not respond to contacts from the presentence investigation report author or his counsel during trial preparation. Counsel and Ecker discussed his defense, but counsel took the view that the documents in the case supported the State's case. Ecker never provided counsel with any documents substantiating his claim the victims loaned funds to him. Counsel attempted to obtain documentation of Ecker's medical issues, but he could not obtain medical opinions supporting Ecker's claims regarding his incapacities. Ecker never submitted any documentation of his alleged physical impairments. The court found Ecker's incapacity claim to be self-serving. Trial counsel testified that Ecker did not raise his concerns with him in a timely way and counsel learned about Ecker's complaints on the eve of trial when Ecker wrote to the court seeking new counsel.

¶9 The circuit court denied Ecker's motion for new counsel because the motion was not timely, Ecker never asked his counsel to withdraw, counsel was ready to try the case with the information he had, and Ecker did not cooperate with counsel in preparing the case for trial. The court attributed to Ecker's lack of communication and manipulation any aspect of the attorney-client relationship

that affected the ability to create an adequate defense or frustrated a fair presentation of the case.

¶10 The circuit court's findings support its conclusion that Ecker did not satisfy the *Jones* good cause factors for substituting counsel. The court found that Ecker's request for new counsel was not timely and by his conduct, Ecker contributed to any difficulty counsel had preparing for trial.

¶11 The circuit court's findings also satisfy the *Lomax* factors for balancing the request for new counsel against the prompt and efficient administration of justice. The victims had been waiting for the trial, Ecker had been recalcitrant and uncommunicative, and counsel was prepared to try the case on schedule.

¶12 Ecker argues on appeal that his counsel did not have time to represent him. This argument is at odds with the circuit court's findings of fact based on its credibility determinations. Trial counsel, whom the circuit court deemed credible, testified that he and Ecker discussed his defense, counsel was prepared for trial, and Ecker was difficult to reach.

¶13 Ecker makes several arguments about the merits of his request for new counsel. These arguments are premised upon his postconviction testimony which the circuit court did not find credible. We are bound by the court's credibility determination, and we therefore do not consider these arguments further.

¶14 Ecker's appellate arguments are also premised on findings other than those made by the circuit court. For example, Ecker argues that his medical issues

were sufficiently documented. It is undisputed that Ecker never provided the documentation the circuit court required to support his claimed health issues.¹

¶15 Ecker argues that he required new counsel because his trial counsel was not versed in real estate law. This argument is not persuasive. Ecker's defense was that the victims loaned the funds to him. It is undisputed that Ecker did not return the funds when asked and no sale ever materialized. These facts do not implicate a complex real estate transaction. Furthermore, counsel testified that he asked Ecker for documents evidencing the claimed loan, and Ecker never provided those documents to counsel. Counsel prepared Ecker's defense, which counsel did not believe required specific knowledge of real estate law.

¶16 The circuit court did not misuse its discretion when it denied Ecker's motion for new counsel.

Plea Withdrawal

¶17 At sentencing, Ecker moved to withdraw his no contest plea. The circuit court denied the motion.

¶18 A fair and just reason is required to withdraw a plea prior to sentencing. *State v. Jenkins*, 2007 WI 96, ¶28, 303 Wis. 2d 157, 736 N.W.2d 24. The decision regarding plea withdrawal is within the circuit court's discretion. *Id.*, ¶30. The court must determine if the fair and just reason is credible and actually exists. *Id.*, ¶43.

¹ Trial counsel testified that Ecker's physicians were unwilling to render an opinion that would have excused Ecker's appearance at a motion hearing he missed or at trial.

¶19 After hearing testimony relating to the plea withdrawal motion, the circuit court found trial counsel's testimony credible and Ecker's testimony not credible and self-serving. It is against this backdrop that we address Ecker's appellate issues.

¶20 In his pro se motion to withdraw his plea, Ecker claimed that he did not understand that the circuit court was not bound by the plea agreement, including sentencing recommendations, and he was concerned that he would be incarcerated as a result of his plea. The circuit court rejected this ground because Ecker was informed by counsel and at the plea hearing that the circuit court was not bound by the plea agreement's terms and that he faced the maximum available penalty. Counsel testified that he and Ecker had a lengthy meeting on the morning of the trial, and Ecker was not impaired. There was no medical proof that Ecker was impaired at the plea hearing or not competent for trial. Therefore, Ecker's reason for plea withdrawal was either not credible or did not exist. *Jenkins*, 303 Wis. 2d 157, ¶43.

¶21 Postconviction, Ecker again argued that his counsel was not prepared for trial, and he asserted his innocence. The former is not supported in the record, as we have discussed in connection with Ecker's request for new counsel. With regard to Ecker's claim of innocence, we assume that the circuit court's prior determinations of Ecker's credibility apply to this claim as well. *State v. Quarzenski*, 2007 WI App 212, ¶19, 305 Wis. 2d 525, 739 N.W.2d 844 (if the court does not make an express credibility finding in relation to a claim, we assume the court made an implicit credibility finding in the course of analyzing the claim). In addition, Ecker offered no credible evidence to support his claimed innocence. Plea withdrawal was not warranted. *State v. Rhodes*, 2008 WI App 32, ¶13, 307 Wis. 2d 350, 746 N.W.2d 599.

¶22 The circuit court did not misuse its discretion when it denied Ecker’s presentence motion to withdraw his no contest plea.²

By the Court.—Judgment and order affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5. This opinion may not be cited except as provided under RULE 809.23(3).

² To the extent we have not addressed an argument raised on appeal, the argument is deemed rejected. See *State v. Waste Mgmt. of Wis., Inc.*, 81 Wis. 2d 555, 564, 261 N.W.2d 147 (1978). (“An appellate court is not a performing bear, required to dance to each and every tune played on an appeal.”).

